LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 409

WYN RUMMLER,
Petitioner,

vs.

PETER N. SPELIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE APPELLATE DEPARTMENT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

WYN RUMMLER,
2119 Rodney Drive
Los Angeles 27, California
In Propria Persona.

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

IN THE

Supreme Court of the United States

October Term, 1966

No.....

WYN RUMMLER,
Petitioner,

vs.

PETER N. SPELIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE APPELLATE DEPARTMENT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the State of California in and for the County of Los Angeles.

OPINIONS BELOW

The opinion of said Appellate Department is set forth in Appendix A. The opinions of the Supreme Court of the State of California and of the California District Courts of Appeal are reported as listed, and the portions thereof pertinent to this petition set forth in Appendix B: *Woods-Drury v. Superior Court,* entered December 31, 1936, 18 Cal. App. 2d 340; *Bell (Alphonzo E.) Corp. v. Listle,* entered May 27, 1946, 74 Cal. App. 2d 638; *Johnson v. Sanches,* entered December 15, 1942, 56 Cal. App. 2d 115; *Greenzweight v. Title Guarantee and Trust C.* entered October 7, 1934, 1 Cal. 2d 577.

JURISDICTION

The judgment of said Appellate Department was entered May 9, 1966, and this petition filed within ninety days of said date. The Court's jurisdiction is invoked under the United States Code Title 28 Supreme Court Rule 19 (1) (b).

QUESTIONS PRESENTED

(1) Where a claim for damages is already before the court in one unlawful detainer action, can cause for a second unlawful detainer action exist in the defendant's non-payment of said claim in advance of its determination by the court?

(2) Where a landlord repudiates a lease or makes acceptance of rent conditional on payment of an amount

not due can he afterwards hold the tenant in default for non-payment of rent for the period during which said repudiation or condition was in force?

(3) Can Section 1500 of the California Civil Code be complied with by a certified check to the creditor, in view of California banking policy against opening accounts or issuing bank books in any name but that of the depositor and/or signatory?

STATUTES INVOLVED

The following are set forth in Appendix C: Sections 1494, 1500, and 1512 of the California Civil Code; Section 1161 (2) of the California Code of Civil Procedure.

STATEMENT OF FACTS

Respondent and petitioner were lessor and lessee respectively. June, 1964 respondent refused petitioner's certified check for the rent and sued him in unlawful detainer Action No. 91753, incidentally asking rental value from June 1. Judgment therein that respondent take nothing was entered August 7, 1964, and motion for new trial denied September 24, 1964. Respondent refused a certified check for the rent for October, 1964, and on October 28, 1964 served petitioner a three day notice to pay rent for June through October of 1964 or quit. September, 1965 respondent served petitioner a three day notice to pay rent for June, 1964 through September, 1965 or quit. October

1965 respondent sued petitioner in unlawful detainer Action No. 227801 pleading said September notice, and November 2, 1965 served petitioner a three day notice to pay rent for December, 1964 through November, 1965 or quit. November 9, 1965 respondent dismissed Action No. 227801 *without* prejudice and filed Action No. 236224. Petitioner demurred and answered under res judicata, also raising, in the Trial Court and on appeal, the issues stated above under "QUESTIONS PRESENTED." The files of Actions No. 91753 and 227801, the October 28, 1964 notice, and the certified checks, uncashed, were presented in the Trial Court, respondent testifying to having refused said checks and being sustained in an objection to the October 28, 1964 notice, as shown more particularly in the Court Reporter's Transcript filed herewith, P. 6 L. 5 — P. 7 L. 21, P. 8 L. 21 — P. 9 L. 4, P. 13 L. 14 — P. 14 L. 1, P. 15 L. 16 — P. 16 L. 3, P. 17 L. 11 — P. 18 L. 2, P. 29 L. 2 — 10, said Transcript, pleadings and files being made a part of the Record on Appeal. The above Statement of Facts is additionally verifiable in the Clerk's Transcript filed herewith.

REASONS FOR GRANTING WRIT

The closing statement of the Appellate Department's Opinion — "in addition to the foregoing legal grounds" etc. "the Court cannot overlook that it would be inequitable" etc. — is an admission to being moved by things other than questions of law. By com-

paring the Memorandum's version of the record with the actual record it is seen that the Appellate Department's veracity is not as great as its penchant for expounding superfluous details in place of facing said questions. Its statement, "the record shows that respondent's first action terminated by a judgment on August 7, 1964," could suggest that petitioner was remiss in not tendering rent the following September. The fact that said action was prolonged until September 24, 1964 is, however, quite legible in that record. The Memorandum gets around the case law against filing a second unlawful detainer action before the first one has been heard and determined by arguing as though Action No. 227801 had been dismissed *with prejudice,* i.e., determined —, again contradicting the record. For some reason feeling it should note, not just the judgment for defendant in Action No. 91753, but also what was alleged by the complaint therein, the Appellate Department asserts: "The record shows (see Exhibit A attached to complaint herein) that respondent's predecessor in title leased the subject premises for use as 'church and classroom.'" This conveys that petitioner was restricted to such use, unless one examines Exhibit A, wherein the provision referred to is, in verbatum, "use of premises *includes* that of church and classroom."

If the Appellate Department can't understand English or stick to the essentials of an appeal any better than that, it would be of great value to the Los

Angeles County Municipal Judiciary to have the meaning of the unlawful detainer statute re-explained with due regard for the limitations of the individuals who will be hearing appeals thereunder. Apropos of that, can be additionally cited the Memorandum's statement that petitioner's "implied waiver of findings" supported the judgment — although the defense was virtually in the nature of a demurrer. Or its laborious proving that the service of the three day notice had been personal, which, in addition to being beside the point, had certainly been admitted by petitioner.

Since the certified checks were not among the things which the Appellate Department "cannot overlook," one supposes it tacitly affirms the Trial Court's contention that for purposes of Section 1500 petitioner should have opened a bank account in respondent's name. The days when any California bank will allow that, however, are long gone. If it is no longer practicable to comply with the section the Court should make it impossible for non-compliance to place a party in default.

In the face of the laws set forth in Appendix C, and the decisions thereon in Appendix B, and despite the judgment that respondent take nothing in Action No. 91753, wherein respondent had claimed accruing rental value, the Memorandum imputes that petitioner should have paid rent during said action. If a landlord is entitled to collect rent for a period during

which he has unsuccessfully prosecuted an unlawful detainer action he has a lease breaking device. The defendant's legal expenses plus the rent may be more than he can manage. If the landlord is also entitled to serve notices making unlawful demands and yet collect rent for the period during which such notices are in force he can experiment in blackmail. The fact that Action No. 236224 contained no claims not made in the earlier Action No. 227801 is, considering the Memorandum's implication that said earlier action had been finally determined, a showing that the Appellate Department feels res judicata should not apply to unlawful detainer suits. Since the word "tenant" often describes not only individual dwellers, but also major industrial enterprises, banking institutions, etc., to grant California landlords the immunity implicit in the Appellate Department's Opinion would be to urge important contributors to California's economy to move to some other state offering greater security for a lessee's investment.

Since any rentals accruing during an unlawful detainer action can only be claimed as damages, the idea of allowing a landlord to demand them in a three day notice in advance of their determination will be, to the average jurist, not very attractive, despite the likelihood that this procedure would lessen his case load, inasmuch as he's liable to be a tenant himself, as are many landlords.

CONCLUSION

To protect the rights of both landlords and tenants, and to assist the Los Angeles County Municipal Judiciary in maintaining high standards of professionalism, a writ of certiorari should issue.

Respectfully submitted,

WYN RUMMLER,
In Propria Persona.

APPENDIX "A"

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

PETER N. SPELIO,	)	Superior
Plaintiff and Respondent,	)	Court No.
vs.	)	Civ A 11296
WYN RUMMLER,	)	Trial Court
Defendant and Appellant.	)	No. 236224

MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, Gerald C. Kepple, Judge. Affirmed.

For Appellant—Wyn Rummler, in propria persona.

For Respondent—Carl Yanow and Walter Colby.

Defendant-appellant lessee has appealed from a judgment following a trial without a jury in favor of plaintiff-respondent lessor, for the recovery of possession of certain real property, for the forfeiture of the lease thereon, and for the sum of $1,110 together with costs in the amount of $13.10.

We have concluded that the judgment herein should be affirmed for the following reasons.

In the first place, judgment for respondent should be affirmed on the legal theory of unlawful detainer, since all of the necessary elements thereof were established in the trial court.

Briefly stated the relevant facts are as follows.

The record shows (see Exhibit A attached to the complaint herein) that on or about February 15, 1963, respondent's predecessor in title, leased the subject premises, by a written agreement, for use as a "church and class room," for a term from February 15, 1963, to February 15, 1966. Respondent, alleging non-conforming use for sign painting, and failure of maintenance, filed his *first* action against appellant to recover possession of the premises, bearing No. 91753 (see Exhibit D) (preceded by a notice of termination of lease served on April 30, 1964, followed by acceptance by respondent of rental payment to and including May 31, 1964) on June 10, 1964, which terminated by a judgment in favor of appellant on August 7, 1964.

The *second* action to recover possession of the premises bearing No. 227801 (see Exhibit E) was commenced on October 14, 1965, following service on September 28, 1965, of a three-day notice to pay or quit, demanding rent for 16 months from June 1, 1964, through September 1, 1965, in the total amount of $1,600, less $40 allowance for utilities, or a net total of $1,560.

On November 9, 1965, at 9:45 A.M. (see Exhibit E) this action was dismissed by respondent, apparently because it claimed rent beyond the statutory limit of twelve months. (Code of Civil Procedure, Section 1161 (2).) (See R.T. p. 8, l. 8-18.)

Respondent filed his *third* action, bearing No. 236224, the case at bench, to recover possession of the premises on November 9, 1965, after he had already previously dismissed case No. 227801. Although respondent had received no rent since June 1, 1964, he demanded recovery only for the rent due for the period of one year from December 1, 1964, through November 30, 1965, in the sum of $1,110 pursuant to said Code of Civil Procedure, Section 1161 (2).

There is no evidence whatever in the record to contradict the positive testimony of respondent's attorney that the second action, No. 227801, had been dismissed, and was no longer pending when he filed the complaint in the case at bench. Respondent's counsel Carl Yanow testified positively "Yes. I filed a dismissal [referring to case No. 227801] before I filed this action." (Referring to case No. 236224 at bench.) (See R.T. p. 16, l. 22-23.)

Therefore the case of *Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal. App. 2d 340 and other authorities relied on by appellant are not in point, and cannot be controlling herein. The holding (as dis-

tinguished from the dictum) in *Woods-Drury, Inc.* at page 346 was obviously to prevent the commencement and pendency of multiple *actions* of a highly penal nature, for forfeiture of the lease, and recovery of rent and damages pursuant to Code of Civil Procedure, Sec. 1174. The language in *Woods-Drury, Inc.* should be considered solely in the light of its particular facts, including the fact that the previous unlawful detainer actions therein had already been tried and had terminated favorably to the plaintiff, so that the only remaining matter was that of formal entry of judgment. Consequently the plaintiff therein could not dismiss the prior action or actions without the consent of the court. In the case at bench, plaintiff had the right to dismiss the previous action at any time without the consent of the court.

The fact that the Three Day Notice to Pay Rent or Quit was served on November 2, 1965, while the second action No. 227801 (dismissed on November 9, 1965) was still pending, is not a fatal defect, within the holding, as distinguished from the dictum in *Woods-Drury, Inc.* That case merely held that a writ of prohibition would be granted to restrain the trial court from further proceedings in two successive unlawful detainer actions while a prior unlawful detainer action was still pending. The court stated at page 345, "In other words, the statute is self-sufficient to wholly protect the lessor. But, in that behalf, one searches in vain to find any express provisions that the lessor, after

commencing one action, may file unlawful detainer actions one after the other, before the first one has been heard and determined. As the statute is highly penal in its term, it is manifest that no such language will be read into it as by construction."

Moreover, Code of Civ. Proc., Sec. 405 provides that "Civil actions in the courts of this state are commenced by filing a complaint."

Code of Civil Proc., Sec. 1162 provides that the three-day written notice prescribed by Code of Civ. Proc., Secs. 1161 and 1161a, may be served (1) by delivering a copy to the tenant personally; or (2) if the tenant is absent from his place of residence and from his usual place of business, it may be served by leaving a copy thereof with some person of suitable age and discretion at either place, and by sending a copy through the mail addressed to the tenant at his place of residence; or (3) if such place of residence and business cannot be ascertained, or a person of suitable age and discretion there cannot be found, then by affixing a copy in a conspicious place on the property, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated.

Respondent in paragraph VII of his complaint alleged that on November 2, 1965, he "caused a Three Day Notice to Pay Rent or Quit, to be served upon the

defendants, by posting a copy of said notice in writing, on the premises in a prominent place on the door, and on November 2, 1965, by mailing a copy of said notice, by depositing said copy in the United States mail, in a sealed envelope, with postage fully prepaid thereon, addressed to said tenant at the said place of residence where the property is situated . . ."

Respondent followed the procedure of Section 1162 (3) for service by thus posting a copy of the notice in a prominent place on the door thereof and by mailing a copy of said notice to the tenant. Appellant in paragraph I of his answer admitted the allegations of said paragraph VII of the complaint, relating to the method of service of the Three Day Notice to Pay Rent or Qunt and has raised no issue whatever on this appeal attacking this method of service thereof.

It may be pointed out by way of analogy, that it has been held that where a tenant admits that he received notice of termination of tenancy as required by Civil Code, Section 1946, which Section states that such notice shall be given as prescirbed by Code of Civil Procedure, Section 1162, "this in law amounted to a personal service." See: *University of So. Cal. v. Weiss* (1962) 208 Cal. App. 2d 759, 769; *Sherman v. Jorgenson* (1895) 106 Cal. 483, 485; *Colyear v. Tobriner* (1936) 7 Cal. 2d 735, 743; *Heinlen v. Heilbron* (1892) 94 Cal. 636.

Clearly, the statute was solely designed to prevent the pendency of such multiple *actions,* and should not render nugatory a Three Day Notice to Pay Rent or Quit which has no penal aspect, and does not constitute the commencement of an action as defined in Code of Civ. Proc., Sec. 405.

In the second place , the judgment should be affirmed, because respondent established all of the essential elements of a valid cause of action in ejectment. (See 2 Witkin, Calif. Proc. p. 1292, Sec. 316; *Payne & Dewey v. Treadwell* (1860) 16 Cal. 220, 243.)

The elements of the cause of action in ejectment are as follows:

First, plaintiff's ownership of some interest in real property, described with such certainty as to enable an officer upon execution to identify it.

Second, defendant's possession and withholding thereof.

Third, damage to plaintiff and the value of rents sought to be recovered.

These three elements were placed in issue by the pleadings, and the implied findings herein support the judgment relative thereto.

As to the first of said elements, respondent in paragraph I of his complaint alleged that he is the owner and entitled to possession of the real property in question, located in the City of Los Angeles, County of

Los Angeles, State of California, known as Penthouse, West Front Suite and Lobby in building at 4415 West Second Street, Los Angeles, California. The evidence clearly established this first element of an action in ejectment. (R.T. p. 3, l. 23 to p. 5, l. 26.)

Second, concerning the defendant's possession and withholding of the property, plaintiff alleged in paragraph III of the complaint that defendants went into possession on or about February 15, 1963, and at all times since were and now are in possession thereof. This was admitted by paragraph I of the answer. In paragraph XI, plaintiff alleged "that the defendants unlawfully detain and retain possession of said premises against the wishes and consent of the plaintiff." See also paragraph VIII of the complaint. All of these allegations were placed in issue by the denials contained in paragraph II of the answer.

The third element of an action in ejectment, namely, damage to plaintiff and the value of rents sought to be recovered, is contained in the allegations set forth in paragraphs V, VI and VIII of the complaint, which were denied in paragraph II of the answer.

In *Samuels v. Singer* (1934) 1 Cal. App. 2d 545, where the landlord's complaint was entitled unlawful detainer, but was entirely lacking in any averment of service of a three-day notice, the court held it to be a good complaint in ejectment as against a demurrer, and affirmed judgment for plaintiff.

Under the authority of *Auto Equity Sales v. Superior Court* (1962) 57 Cal. 2d 450, that case is binding upon this court.

Since the record does not indicate that either appellant or respondent requested findings, they are deemed waived in the municipal court. Code of Civ. Proc., Sec. 632; *Mastrofini v. Swanson* (1952) 114 Cal. App. 2d Supp. 848.

Where, as here, findings of fact are waived, sub silentio, pursuant to said Section 632, and the exact basis upon which the case was decided for the respondent does not appear in the record, adequate proof, based either upon the legal theory of unlawful detainer, or upon the legal theory of ejectment, should be sufficient since it must be assumed, when findings are waived, that every intendment is in favor of the judgment and that all issues necessary to the decision under the pleadings and evidence, were resolved by the trial court in favor of respondent. *Mastrofini v. Swanson, supra* (1952) 114 Cal. App. 2d Supp. 848, 850; *Bekins Van Lines, Inc. v. Johnson* (1942) 21 Cal. 2d 135, 137.

It is presumed that every fact essential to the support of the judgment was proved and found by the court. *Bekins Van Lines, Inc. v. Johnson, supra* (1942) 21 Cal. 2d 135, 137; *Snyder v. Snyder* (1951) 102 Cal. App. 2d 489, 490, 491.

Thus the implied findings of the trial court are deemed to be in favor of respondent on all issues, including the issues constituting the necessary elements of a valid cause of action in ejectment, as well as in unlawful detainer.

Finally, in addition to the foregoing legal grounds for affirming the judgment, it should be pointed out that the court cannot overlook that it would be inequitable to permit appellant to withhold possession of respondent's property for more than a year without the payment of the agreed rental, or compensation to respondent in damages for such withholding.

The judgment of the trial court is affirmed; respondent to recover his costs on appeal.

Dated May 9, 1966.

BREITENBACH, Judge

We concur:

AISO, Presiding Judge
HUFSTEDLER, Judge

APPENDIX "B"

Woods-Drury v. Superior Court, supra "In the absence of any express provision that the lessor, after commencing one action, may file unlawful detainer actions one after the other, before the first one has been heard and determined, no such language will be read into it as by construction, and a trial court has no jurisdiction to entertain such an action while a prior one remains undetermined . . . Statutory notice served in the unlawful detainer action was a waiver of formal tender of rent."

Bell (Alonzo E.) Corp. v. Listle, supra "The lessor's repudiation, if not withdrawn, is a continuing excuse for the lessee's failure to perform. If performance of the obligations under the lease is prevented by the lessor the lessee is entitled to all the benefits he would have obtained by the mutual performance of both parties."

Johnson v. Sanches, supra "When the amount demanded exceeds the amount due, a notice to pay rent or surrender possession does not comply with the statute."

Greenzweight v. Title Guarantee and Trust Co., supra "A credit given for the amount of a check by the bank on which it is drawn is equivalent to, and will be treated as, the payment of the check, and it is the same as if the money had been paid over the counter and then immediately paid back again to the account or for the use for which credit is given."

APPENDIX "C"

California Civil Code

Section 1494. An offer of performance must be free of any condition which the creditor is not bound on his part to perform.

Section 1500. An obligation for the payment of money is extinguished by a due offer of payment, if the amout is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof given to the creditor.

Section 1512. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits he would have obtained if it had been performed by both parties.

California Code of Civil Procedure

Section 1161. A tenant of real property, for a term less than life, or the administrator of his estate, heretofore qualified and now acting, or hereafter to be qualified and now acting, is guilty of unlawful detainer:

(2) When he continues in possession, in person or by subtenant, without the permission of his landlord, if any there be, after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days notice in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served on him, and if there is a subtenant in actual occupation of the premises, also the subtenant.

Such notice may be served at any time within one year after it becomes due.